Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES FRANCIS LEINENBACH
A/K/A JAMES NELSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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On the Petition:
JUDD BURSTEIN
MARC FERNICH

Questions Presented

1. Whether petitioner's trial was fundamentally unfair because the lower courts (a) allowed substantially all of the government's exhibits to go to the jury, but (b) permitted substantially all of petitioner's exhibits to be withheld from the jury -- a decision that conflicts with the presumption, recognized by several other Circuits, that *all* exhibits properly admitted in evidence should be submitted to the jury?

2. Whether the definition and chemical composition of DL Methamphetamine should be clarified for purposes of the Sentencing Guidelines' 10:1 sentencing differential between "Methamphetamine" and "L Methamphetamine" -- an issue that has split the Courts of Appeal?

List of Parties

Petitioner was indicted and tried alone.

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In The

Supreme Court Of The United States

October Term, 1995

JAMES FRANCIS LEINENBACH
A/K/A JAMES NELSON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner James Francis Leinenbach a/k/a James Nelson respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit, affirming his convictions for conspiracy to manufacture and distribute methamphetamine (21 U.S.C. §§ 841 and 846); manufacturing methamphetamine (21 U.S.C. § 841 and 18 U.S.C. § 2); and possessing methamphetamine with intent to distribute (21 U.S.C. § 841(a)(1)). Leinenbach, 52, was sentenced principally to a term of 27 years imprisonment.

Opinion Below

The Court of Appeals' unpublished Judgment-Order, affirming Leinenbach's conviction and sentence without opinion, appears at (PA: 1a).[1] The Court of Appeals' denial of Leinenbach's rehearing petition appears at (PA: 3a).

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals denied Leinenbach's rehearing petition on December 11, 1995. Thereafter, Justice Souter extended Leinenbach's time to file this petition through April 9, 1996. (PA: 5a) This petition timely follows.

Constitutional and Statutory Provisions

Pursuant to this Court's Rule 14.1(f), the constitutional and statutory provisions involved in this petition appear verbatim at (PA: 7a). They are:

18 U.S.C. §§ 2; 3231.

21 U.S.C. §§ 841; 846; 848.

28 U.S.C. § 1254(1).

Fed. R. Evid. 105.

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[1] Numbers preceded by "A:" refer to pages of the Joint Appendix submitted to the Court of Appeals. Dates followed by numbers refer to pages of the trial transcripts not included in the Joint Appendix. Numbers preceded by "PA:" refer to pages of the appendix to this petition.

Jurisdiction in the District Court

The District Court for the Eastern District of Pennsylvania (Reed, D.J.) had jurisdiction under 18 U.S.C. §§ 2 and 3231, as well as 21 U.S.C. §§ 841 and 846.

Statement of the Case

Far from overwhelming, the government's proof in this case rested solely upon accomplice witnesses who not only failed to corroborate, but affirmatively contradicted, each other. Moreover, Leinenbach mounted an aggressive defense, even testifying in his own behalf. Tellingly, the jury deliberated for four days and sent a deadlock note before finally reaching a verdict.

A. THE GOVERNMENT'S CASE

1. THEORY AND PRINCIPAL EVIDENCE

The government's theory was a simple one. It contended that, between 1986 and mid-1988, Leinenbach and linchpin cooperating witness William Kelly had an informal agreement to manufacture and distribute methamphetamine whenever the active ingredient, phenyl-2-propanone ("P2P"), became available. Leinenbach allegedly would provide the P2P. Kelly would "cook" it and sell the resultant "speed." They allegedly would split the proceeds. (4/26 -- 140-41)[2]

Kelly's testimony was the backbone of the government's case, providing, as it did, the *sole* direct link between Leinenbach and the charged conspiracy. In essence, Kelly testified that on

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[2] Numbers preceded by dates refer to pages of the trial transcripts.

eight separate occasions between 1986 and 1988, he and others "cooked" P2P allegedly supplied by Leinenbach, and then distributed the resultant "speed." Significantly, *no other witness identified Leinenbach as the source of the P2P.*

2. SOURCES OF EVIDENCE

As noted, substantially all of the government's proof came from accomplice witnesses testifying pursuant to cooperation agreements: Kelly, Edward Pemper, John Spadaccino and William Thompson. These witnesses had extraordinary credibility problems.

For example, Kelly -- a self-described "monstrosity" of a drug trafficker -- admitted to cooking a mind-boggling 112 pounds (approximately $1.25 million worth) of speed in 1989-90 alone. (4/26 -- 129-30, 132, 171, 174, 204-05; 4/28 -- 98-100, 113, 161-69, 175-76; 4/29 -- 39-40) He boasted a $50,000 freebase cocaine habit, distinguished by "day or two binges" laced with alcohol. In addition, he enjoyed a stereotypical drug dealer lifestyle, replete with a half dozen houses, cars and weekend-long, $2000-$4000 crack orgies at luxury adult hotels and strip clubs. (4/26 -- 129; 4/28 -- 111-15, 117, 121-23, 127; 4/29 -- 35-37, 55, 148-50, 173, 187-88; 5/2 -- 56, 62-63, 73-74, 101-03, 107-08, 117 *et. seq.*, 181-82) Having initially fled to Florida to escape his own impending indictment, Kelly eventually pled guilty to drug "kingpin" charges (21 U.S.C. § 848 -- continuing criminal enterprise) carrying multiple life sentences and a $7 million fine. By cooperating with the government, however, he reduced his sentence to an incredible *five years and $900.* (4/26 -- 128, 176, 186; 4/28 -- 147, 211-12)

As for Pemper, he admitted to abusing methamphetamine and cocaine "[m]any, many, many times,"[3] and to secreting massive amounts of quaaludes and speed at his Northeast Philadelphia upholstery shop, a clearing-house for cocaine and machine guns. (5/2 -- 188-89; 5/3 -- 64-65, 69, 74-75, 81-83, 102-03, 106-08, 137-38) In over 35 transactions between 1984 and 1989, Pemper purchased and distributed an alarming 200 pounds (approximately $650,000 worth) of "meth." (5/2 -- 189; 5/3 -- 34, 47-48, 59-64, 80, 86, 94-95, 97-101, 128, 138, 144, 151) Among other accomplishments, Pemper also (a) guarded a "cook" with an Uzi, (b) received and cut "meth" at the home of his wife and child, (c) filed perjurious tax returns, and (d) withheld material information at a compatriot's sentencing. (5/3 -- 92-93, 96, 134, 146, 158)

Spadaccino, an admitted cocaine, speed and alcohol abuser, likewise distributed at least 85 pounds of "meth" for mafia affiliated, $52 million drug organizations. (4/25 -- 94, 98, 152-60, 162; 4/26 -- 25-28, 49-52, 82, 100-03, 114-16) Having pled guilty to $6 million federal counterfeiting charges, he earned a mere five year probationary sentence by cooperating with the government regarding his "involvement with drugs, burglaries and counterfeiting." (4/25 -- 96; 4/26 -- 118; 4/28 -- 18) At the time of Leinenbach's trial, Spadaccino still faced a possible 20 year sentence, which he hoped to reduce by testifying against Leinenbach, for state drug conspiracy and corrupt organization convictions. (4/25 -- 95-96; 4/26 -- 100-05, 114-16)

Finally, there was Thompson, Kelly's self-described "puppet" and right hand man. A walking medicine chest, he was arrested on state angel dust charges *after he began cooperating*

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[3] Contrary to Kelly's own testimony that he never took speed, Pemper testified that they used the drug together. (4/26 -- 128-29; 5/3 -- 69)

in this case and testified against Leinenbach in the grand jury. (5/2 -- 56, 58-59, 172-75) Equally troubling, *he concealed this arrest from the government until confronted with it on the day of his Rule 11 plea.* (*Id.* at 58-59, 135-37, 141-42, 168, 172-75) Faculties dissipated, Thompson *misidentified Leinenbach from the stand, could not add 63 plus 19* (answer: 86 or 87), *or even remember whether he had pled to the angel dust charges a week or a month earlier.* (*Id.* at 58, 117, 165-66, 177)[4]

3. INCONSISTENCIES & ABSENCE OF CORROBORATION

Not surprisingly, given his role as the *sole* direct link between Leinenbach and the charged conspiracy, Kelly implicated Leinenbach exclusively in transactions to which there were no available witnesses. As Kelly himself readily acknowledged on cross-examination, no one "could confirm or deny or corroborate anything," either because (a) no one else witnessed the transactions at issue, (b) anyone who did had died, or (c) the government failed to produce any of the few living witnesses that he actually identified. (*See, e.g.*, 4/26 -- 150-58, 162-63; 4/28 -- 178-83, 187, 194, 198; 4/29 -- 23-24, 32-33, 91-115, 154)

B. LEINENBACH'S CASE

1. THEORY

In essence, Leinenbach portrayed himself as an habitual gambler and loanshark with a chronic, anomalous aversion to

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[4] In the face of a government stipulation that a full year had passed since his grand jury testimony, Thompson also insisted that he testified before the grand jury just five months earlier. (*Id.*)

drugs. (*See generally, e.g.*, 5/9 -- 166-77, 183; 5/10 -- 14, 35-36, 126) Consistent with this theory, Leinenbach styled Kelly's debts to him as loanshark debts, rather than drug debts, which he tried to collect from both Kelly and Pemper, Kelly's subordinate debtor. (5/10 -- 20-29, 33)

2. PROOF & SOURCES

Numerous character witnesses confirmed that Leinenbach supported his family as a bookmaker and shylock who abhorred drugs. (*See generally, e.g.*, 5/4 -- 45-99; 5/5 -- 11-20; 5/9 -- 93-110, 150-62)

Further, four government agents pointed out glaring discrepancies between the cooperating witnesses' debriefing statements and their trial testimony. For example, one agent conceded that Pemper proffered three different versions -- none fully consistent with his trial testimony -- of how and when he met Leinenbach, and how much he paid him. In addition, the same agent acknowledged that Pemper merely tied Leinenbach to debt collection, not drugs. (5/5 -- 117-18; 5/6 -- 76-89)

Contrary to Kelly's denials, moreover, the agents also testified (a) that Kelly's brother, Bruce, had been heavily involved in the drug trade (*see, e.g.*, 5/4 -- 113, 186-87; 5/5 -- 113, 127 *et seq.*, 156 *et. seq.*); (b) that Kelly had left Philadelphia for Florida in mid-1990 to escape government surveillance; (c) that he had continued, not ceased, his drug activity in Florida (*see, e.g.*, 5/4 -- 212; 5/5 -- 23-29); and (d) that Kelly had, in fact, been officially declared a fugitive. (5/26 -- 124-25)

Finally, Leinenbach himself took the stand, testifying consistent with the theory set forth above. (*See generally* 5/9 -- 162-84; 5/10 -- 4-126)

* * *

Given the foregoing, the government cannot seriously dispute that this was a close case -- a credibility contest pitting Kelly's essentially uncorroborated word against that of Leinenbach. Another jury easily could have believed Leinenbach and acquitted. Indeed, in light of the jury's four days of deliberation and deadlock note, it is impossible to credibly argue otherwise.

REASONS FOR GRANTING THE PETITION

I. CONTRARY TO THE PRESUMPTION, RECOGNIZED BY SEVERAL OTHER CIRCUITS, THAT ALL PROPERLY ADMITTED EVIDENCE SHOULD BE SUBMITTED TO THE JURY, THE LOWER COURTS DENIED LEINENBACH A FAIR TRIAL WHEN THEY (A) ALLOWED SUBSTANTIALLY ALL OF THE GOVERNMENT'S EXHIBITS TO GO TO THE JURY, BUT (B) WITHHELD SUBSTANTIALLY ALL OF LEINENBACH'S EXHIBITS FROM THE JURY.

As detailed above, this was a case that rose and fell on the credibility of the government's accomplice witnesses. Recognizing this fact, Leinenbach mounted an aggressive, week-long defense premised on the theory that the witnesses were falsely accusing him to curry government favor, and thereby reduce their own sentences. At the heart of this theory, according to defense counsel himself, were "28 or 30" defense exhibits (5/11 -- 96), including the accomplice witnesses' indictments, plea and cooperation agreements and proffer statements. (*See generally* (A: 38-66)) Significantly, these exhibits were the *only* documentary proof of the severe charges and punishments that the witnesses faced, and -- as defense

counsel argued in summation -- their "many, many [other] crimes [] never [even] charged and [indeed] ... forg[iven]" by the government. (5/11 -- 84) As such, the exhibits were crucial to Leinenbach's claim that the witnesses were biased and had a motive to fabricate to please the government.

At the end of a hard-fought case, however, the Trial Court ruled that, despite their previous admission without objection (*see*, *e.g.*, A: 46, 48-49, 61), substantially *all* of Leinenbach's exhibits would be kept from the jury. (A: 38-40)[5] Conversely, the Court ruled that substantially all of the government's exhibits would *go* to the jury.[6] Simply as a matter of fundamental fairness, these decisions -- which the Court of Appeals let stand without opinion -- gutted Leinenbach's defense, and left the jury with an unbalanced and misleading view of the evidence: the government's.

Even more fundamentally, though, the decisions cannot be harmonized with the general presumption, recognized by several other Courts of Appeal, that "*[j]urors are generally entitled to examine documents properly admitted in evidence....*" *United States v. DeCoito*, 764 F.2d 690, 695 (9th Cir. 1985) (Emphasis supplied); *see Dallago v. United States*, 427 F.2d 546, 553 (D.C. Cir. 1969) ("*jurors, at some time prior to verdict, are [so] entitled...*") (Emphasis supplied); *United States v. Bertoli*, 854 F.Supp. 975, 1073 (D.N.J.) ("The jury was entitled, *and in fact obligated*, to view all the evidence introduced at trial") (Emphasis supplied), *aff'd in part, vacated*

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[5] Specifically, the Trial Court withheld all but *four* defense exhibits, one of which the *government* had asked the Court to send to the jury. (A: 39, 43)

[6] Specifically, the Trial Court sent the jury all 16 government exhibits requested by the prosecutor. (A: 43)

in part on other grounds, 40 F.3d 1384 (3d Cir. 1994); *United States v. Furey*, 491 F.Supp. 1048, 1068 (E.D.Pa.) ("If admitted into evidence as an exhibit ... the text of the opinion, as any other exhibit, would normally be sent out with the jury during deliberations"), *aff'd*, 636 F.2d 1211 (3d Cir. 1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1987 (1981).

In barring substantially *all* of Leinenbach's exhibits from the jury, the Trial Court essentially reasoned (a) that it had been "very careful to tell [Leinenbach]" throughout the trial that the exhibits "would be received in evidence," with their use to be "determined later;" (b) that the exhibits contained "inadmissible, irrelevant, objectionable material" never presented to the jury;[7]

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[7] This concern could have been met, for example, by a simple redaction. *See, e.g., United States v. Parker*, 491 F.2d 529, 530 (8th Cir.) ("[i]n cases where [] hearsay is contained in [an exhibit], *it would be a simple procedure to excise the prejudicial portion before giving it to the jury*") (Lay and Heaney, J J.) (Dissenting from denial of *en banc* review) (Emphasis supplied); *id.* ("That recitation constituted hearsay and the trial court in each case should have ordered the references to details of the sales transaction removed from the exhibits") (Bright and Ross, J.J., separate statement of views on petition for rehearing), *cert. denied*, 416 U.S. 989, 94 S.Ct. 2396 (1974); *United States v. Gross*, 451 F.2d 1355, 1358 n.5 (7th Cir. 1971) (approving trial court proposal to "'permit the first 18 pages of the document to the jury. Any of the other material would just confuse the jury. *You could tear those out, and they can go to the jury room*'" (Emphasis supplied); *Dallago v. United States, supra*, 427 F.2d at 553 ("portions of documentary evidence" may "be shielded from the jury's view," by "excising or otherwise").

(continued...)

and (c) that the relevant portions had been adequately "read," "explained" and "argued" before the jury. (A: 48, 51, 57, 61-62, 64-65) With all respect, the Court's view contravenes a raft of precedent from around the Circuits.

As the Third Circuit and this Court have long recognized, "[i]n any criminal trial, the credibility of the prosecution's witnesses is central." *United States v. Gambino*, 926 F.2d 1355, 1363 (3d Cir.), *cert. denied*, 502 U.S. 956, 112 S.Ct. 415 (1991). Hence, contrary to the Trial Court's position, "'bias of a witness is *not* a collateral issue and extrinsic evidence *is* admissible to prove that a witness has a motive to testify falsely.'" *United States v. James*, 609 F.2d 36, 46 (2d Cir. 1979) (Emphasis supplied) (*Quoting United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976)), *cert. denied*, 445 U.S. 905, 100 S.Ct. 1082 (1980); *see United States v. Abel*, 469 U.S. 45, 51, 105 S.Ct. 465, 468 (1984) ("The Courts of Appeals have upheld use of extrinsic evidence to show bias") (Collecting cases).

The exhibits here introduced by Leinenbach -- plea and cooperation agreements, indictments and proffer statements -- were textbook examples of extrinsic evidence to show bias and motive. As the Court explained in *United States v. Werme*, 939

(...continued)

Indeed, pursuant to the jury's subsequent request, the Trial Court itself later sent the jury a redacted version of one withheld exhibit. (5/12 -- 19) We ask why the Court did not follow that procedure in the first instance with respect to all of the exhibits? Moreover, in complying with the jury's request, the Court also remarked, "*I've read all of these [requested exhibits] and I'm not concerned about most of them.*" (5/12 -- 15) (Emphasis supplied) Why, then, did the Court withhold them and the other exhibits in the first place?

F.2d 108, 114 (3d Cir. 1991), *cert. denied*, 502 U.S. 1092, 112 S.Ct. 1165 (1992):

> *The most frequent purpose for introducing such evidence is to bring to the jury's attention facts bearing upon a witness's credibility.... Proof that a witness has pleaded guilty or has agreed to plead guilty is highly relevant to show bias, a recognized mode of impeachment....* Proof of bias is almost always relevant and, unlike less favored forms of impeachment, may be shown by extrinsic evidence.

(Emphasis supplied) (Citations and internal quotes omitted).

In *United States v. Gaev*, 24 F.3d 473, 476-77 (3d Cir.), *cert. denied*, __ U.S. __, 115 S.Ct. 574 (1994), the Court reiterated these principles:

> If a co-conspirator who appears as a witness has pleaded guilty, *the trier of fact should know about the plea agreement in order properly to evaluate the witness's testimony....* When a co-conspirator testifies he took part in the crime with which the defendant is charged, *his credibility will automatically be implicated.* Questions will arise in the minds of the jurors whether the co-conspirator is being prosecuted, why he is testifying, and *what he may be getting in return.* If jurors know the terms of the plea agreement, these questions will be set to rest and *they will be able to evaluate the declarant's motives* and credibility.

(Emphasis supplied) (Citations omitted); *see, e.g., United States v. James, supra*, 609 F.2d at 45-46 (error to exclude FBI reports on government witness where relevant to bias); *United States v. Warner*, 955 F.2d 441, 455 (6th Cir.) (guilty pleas of co-defendant witness properly admitted to help jury assess her credibility), *cert. denied*, 505 U.S. 127, 112 S.Ct. 3050 (1992), *amended and superseded on other grounds*, 971 F.2d 1189 (6th Cir. 1992); *United States v. Louis*, 814 F.2d 852, 856 (2d Cir. 1987) (proper purposes for coconspirator guilty plea include disclosure of matters damaging to witness credibility); *United States v. Garcia*, 13 F.3d 1464, 1469 (11th Cir.) (defense counsel cross-examined government witness about plea agreement "and entered the agreement into evidence"), *cert. denied*, __U.S.__ , 114 S.Ct. 2723 (1994).

In light of these overwhelming authorities, there can be no doubt that Leinenbach's exhibits were not only properly admitted into evidence, but indispensable to his bias and motive claims -- all the more so where the cooperating witnesses themselves were the fulcrum of the government's case.

As noted, these facts, in turn, implicate the Circuit-wide presumption that "*[j]urors are generally entitled to examine documents properly admitted in evidence....*" *United States v. DeCoito, supra*, 764 F.2d at 695 (Emphasis supplied).

Plainly, then, the jury was entitled to see -- and the lower courts departed from the mandate of their sister courts in withholding -- Leinenbach's "properly admitted," *id*, plea agreements, indictments and proffer reports. This is especially so where, as here, the exhibits were the *only* documentary proof of the benefits reaped by the witnesses by virtue of their cooperation -- as stated, a "central" consideration "[i]n any criminal trial." *United States v. Gambino, supra*, 926 F.2d at 1363.

In response to the Trial Court's concern that the jury might misuse the exhibits, we suggest that the appropriate answer was *not* wholesale exclusion, but an ordinary limiting instruction, which jurors are presumed to follow. *See, e.g., United States v. Vastola*, 899 F.2d 211, 236 (3d Cir.) (*Citing Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S.Ct. 3102, 3109 n.8, *reh'g denied*, 483 U.S. 1056, 108 S.Ct. 30 (1987)), *vacated on other grounds*, 497 U.S. 1001, 110 S.Ct. 3233 (1990). In fact, Courts have made clear that "[w]hile a co-defendant's guilty plea may be admissible on the issue of credibility, *the district court must instruct the jury regarding the limited purpose for which that evidence may be used*," *i.e.*, not as substantive proof of guilt. *Government of Virgin Islands v. Mujahid*, 990 F.2d 111, 115-16 (3d Cir. 1993) (Emphasis supplied). Put differently, "[w]hile evidence of a guilty plea may be admissible for impeachment ..., the party against whom the evidence is offered" -- here, the government -- "is *entitled* to a limiting instruction on request" under Fed. R. Evid. 105. *United States v. Werme*, *supra*, 939 F.2d at 114 (Emphasis supplied); *accord United States v. Thomas*, 998 F.2d 1202, 1206 (3d Cir. 1993) ("In several cases where evidence of a co-conspirator's guilty plea was entered, we have held that proper limiting instructions from the court cured the possible prejudice"); 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 410[07] (1993) ("it is not error to inform the jury of the plea so long as a proper cautionary instruction is given"). Hence, the Trial Court easily could have balanced both parties' interests short of rejecting Leinenbach's exhibits *in toto*.

To compound the prejudice of withholding substantially all of Leinenbach's exhibits, the Trial Court sent the jury virtually all of the government's exhibits. This decision runs counter to a line of Seventh Circuit cases which found error in disparities far less extreme. In *United States v. Medina*, 552 F.2d 181, 191-92 (7th Cir.), *cert. denied*, 434 U.S. 839, 98 S.Ct. 132 (1977), for example, the Court held that "*the lower court abused its*

discretion in permitting all of the Government exhibits to be taken into the jury room while barring the jury from receiving" just one defense exhibit.[8] (Emphasis supplied) (Citation omitted) Similarly, in *United States v. Samples*, 713 F.2d 298, 303 (7th Cir. 1983), the Court stressed that "district judge[s] [may] *not* selectively send only prejudicial evidence to the jury room." (Emphasis supplied) In *Samples*, however, the Trial Court "acted even-handedly" because, in contrast to this case, "*[a]ll exhibits, the government's and the defendant's, were given to the jury.*" *Id.* (Emphasis supplied).

Recently, the Seventh Circuit distilled these principles in *United States v. Hofer*, 995 F.2d 746, 749 (7th Cir. 1993):

> *[A]s long as the district court is evenhanded in its evidentiary rulings*, the district court has wide discretion in determining whether an exhibit will be allowed to go into the jury room.... Here, *no claim can be made that the district court treated the defendant's exhibits less charitably than the government's. The district court also allowed Mr. Hofer's only evidentiary exhibit, a copy of Mr. Hess' plea agreement, to be taken into the jury room. Accordingly, we cannot accept Mr. Hofer's assertion that the jury had unlimited access to the government's case while his case was allowed to become remote in the jurors' memories by the end of deliberations.*

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[8] Finding the evidence overwhelming, however, the Court deemed the error harmless and affirmed. The same cannot be said of this exceptionally close case with, *inter alia*, its four days of deliberations and deadlocked jury.

(Emphasis supplied) (Citations omitted); *Compare Young v. Lukens Steel Company*, 881 F.Supp. 962, 975 (E.D. Pa. 1994) ("*Both parties had certain requests denied and certain requests granted*") (Emphasis supplied).

This case epitomizes the lack of evenhandedness warned against in *Samples* and *Hofer*. In those cases, the jury received "*[a]ll exhibits, the government's and the defendant's....*" *United States v. Samples*, *supra*, 713 F.2d at 303 (Emphasis supplied). Here, in contrast, the Trial Court sent the jury substantially *all* of the government's exhibits, but virtually *none* of Leinenbach's. Could there be any clearer example of "treat[ing] the defendant's exhibits less charitably than the government's[?]" *United States v. Hofer*, *supra*, 995 F.2d at 749. Moreover, the error in *Medina*, where the trial court barred just *one* defense exhibit, pales in comparison to the error in this case, where *at least 15* defense exhibits were excluded. Thus, "[c]onsidering the overall context of which exhibits were sent out and not sent out," *Young v. Lukens Steel Company*, *supra*, 881 F.Supp. at 976, there can be no doubt that Leinenbach's jury did, in fact, have "unlimited access to the government's case while his case was allowed to become remote in the jurors' memories by the end of deliberations." *United States v. Hofer*, *supra*, 995 F.2d at 749.[9]

Beyond the *per se* prejudice of a gutted defense and the one-sided case submitted to the jury, Leinenbach suffered

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[9] In addition, "[i]t has been held that, *where*" *as here*, "*only a portion of the evidence is submitted to the jury, the trial court should give the jury a cautionary instruction* to ensure 'undue emphasis is not placed on that evidence.'" *United States v. Bertoli*, *supra*, 854 F.Supp. at 1073 n.171 (Emphasis supplied) (*Quoting United States v. De Hernandez*, 745 F.2d 1305, 1308 (10th Cir. 1984)). *No such instruction was given in this case.*

palpable prejudice from the Trial Court's rulings. For example, during cross-examination seeking to establish Kelly's motive to fabricate to avoid massive exposure for the myriad crimes charged in his indictments, the following exchange took place in open court:

> MS. MILLER (prosecutor): Objection. Relevance. Judge, are we gonna read the whole indictment?
>
> THE COURT: I don't know. It is not necessarily so that the jury hears just the way the Government wants to present it, but there's nothing wrong with the jury knowing these details, but to stand in open court and read them may not be necessary. *These documents either can be seen by the jury or summarized in closings, all sorts of ways to do it.*
>
> MS. MILLER: *Your Honor, the Government would stipulate to that as an exhibit and the jury can see it anytime rather than read the whole thing word for word now.*
>
> ***
>
> MR. HIRSCH (defense counsel): *Given the suggestion of the Government that they will stipulate to the admissibility and the presentation to the jury at the appropriate time, I will offer* [the document in lieu of cross-examination]....
>
> ***

> MS. MILLER: And, Your Honor, without being rude *the Government would also stipulate to superseding information 91-671 for the same purpose*.
>
> ***
>
> THE COURT: *Members of the jury*, at some point, and perhaps in some more detail, *you'll either see or receive information from these papers*....

(4/28 -- 139-42) (Emphasis supplied)

Yet, later, the Court sustained the government's objection to the jury seeing these very exhibits. As a result, Leinenbach lost (a) valuable cross-examination of the government's key witness; (b) the opportunity to share the exhibits with the jury; and (c) credibility when the exhibits failed to materialize.

Moreover, Leinenbach's credibility was further compromised when the Trial Court's rulings caused him to breach the following representation, made in summation:

> *There were 28 or 30 defense exhibits in this case. The plea agreements, the proffers, the debriefings, the -- all of the stuff that we went through. There's the address book. There's many things that ... we have offered into evidence for your submission.*

(5/11 -- 94-96) (Emphasis supplied)

For all these reasons, then, there can be no harmless error claim in this exceedingly close case that featured, *inter alia*, four days' deliberation and a deadlocked jury.

II. THE DEFINITION AND CHEMICAL COMPOSITION OF DL METHAMPHETAMINE SHOULD BE CLARIFIED FOR PURPOSES OF THE SENTENCING GUIDELINES' 10:1 SENTENCING DIFFERENTIAL BETWEEN "METHAMPHETAMINE" AND "L METHAMPHETAMINE."

Applying the 1987 Guidelines to avoid *ex post facto* problems,[10] the Trial Court calculated Leinenbach's *27 year* sentence as follows:

> (a) It held him accountable for 90 pounds of "Methamphetamine" under the Drug Equivalency Table, § 2D1.1, Commentary. (11/14 -- 122)
>
> (b) Using the Drug Equivalency Table, it converted those 90 pounds into 67,183.20 grams, or 67.18 kilograms, of cocaine.[11]

---

[10] *See, e.g., United States v. Watkins*, 912 F.Supp. 417, 420 n.3 (E.D.Ark. 1996) (Court must apply Guidelines in effect at time of offense if less stringent than those in effect at time of sentence) (*Citing United States v. Reetz*, 18 F.3d 595, 597-98 (8th Cir. 1994); *United States v. Bell*, 991 F.2d 1445, 1452 (8th Cir. 1993)).

[11] Under the Drug Equivalency Table, one gram of "Methamphetamine" equals two grams of cocaine. Hence, 90

(continued...)

(c) Pursuant to § 2D1.1's Drug Quantity Table, it assigned a Base Offense Level of 36 for more than 50 kilograms of cocaine.

(d) Pursuant to § 3B1.1(c), it added two points for Leinenbach's role in the offense, for an adjusted offense level of 38.

(e) Combined with Leinenbach's Criminal History Category of IV, that yielded a sentence range of 324-405 months.

(f) The Court sentenced Leinenbach to 324 months (27 years), the bottom of the Guidelines range.

In this POINT, we renew our challenge to step (a), above. Specifically, we contend that it was error to sentence Leinenbach on the basis of 90 pounds of "Methamphetamine." In so arguing, we invite the Court to clarify a "confusing and difficult," *United States v. Cook*, 49 F.3d 663, 665 n.3 (10th Cir. 1995), area in which "the Circuits are split," *Lambert v. United States*, 908 F.Supp. 356, 360 (W.D.Va. 1995): to wit, "the guidelines' entire approach to methamphetamine sentencing[, which] is confusing and difficult to apply." *United States v. Cook*, *supra*, 49 F.3d at 665 n.3 (*Citing United States v. Carroll*, 6 F.3d 735, 749 (11th Cir. 1993) (Bright, J., *concurring in part and dissenting in part*) (Guidelines cause "confusion due to the convoluted chemical rhetoric" necessarily attendant to methamphetamine sentencing cases), *cert. denied*, _ U.S. _, 114 S.Ct. 124 (1994).

(...continued)
pounds (33,591.60 grams) of methamphetamine equals 67,183 grams, or 67.18 kilograms, of cocaine.

Invoking the rule of lenity, Leinenbach asserted prior to sentencing that he should be sentenced for manufacturing and distributing "L Methamphetamine," rather than "Methamphetamine." *See* April 31, 1994 sentencing memorandum at 13. Under the Drug Equivalency Table, *"Methamphetamine" carries a 10 times higher conversion ratio than "L Methamphetamine."*[12]

In response to this claim, the government proffered the testimony of Jack Fasanello, a DEA chemist, at a November 14, 1994 sentencing hearing. Based solely upon Kelly's trial testimony and without any independent laboratory analysis, Fasanello opined that Kelly's manufacturing process could only produce a substance called "DL Methamphetamine." (*See, e.g.*, 11/14 -- 27-29)[13] Unlike "Methamphetamine" and "L

---

[12] Whereas one gram of "Methamphetamine" equals 2.0 grams of cocaine, one gram of "L Methamphetamine" equals *0.2* grams of cocaine. Thus, using the Court's 90 pound figure, Leinenbach's Base Offense Level would have been 32, rather than 36, if he had been sentenced for "L Methamphetamine" instead of "Methamphetamine." *See* Drug Quantity Table.

[13] To this end, we note that "the Circuits are [even] split ... as to the significance, for sentencing and appeal purposes, of an absence of chemcial test results stating the exact form of methamphetamine in a given case." *Lambert v. United States, supra*, 908 F.Supp. at 360; *Compare, e.g., United States v. Lande*, 40 F.3d 329, 331 (10th Cir. 1994) (upholding forensic chemists' affidavits stating that they had never encountered clandestine lab producing L-methamphetamine), *cert. denied*, __U.S.__, 115 S.Ct. 1988 (1995), with *United States v. Dudden*, 65 F.3d 1461, 1995 WL 545043 (9th Cir. 1995) (rejecting, where no drugs were recovered or tested, forensic chemists' (continued...)

Methamphetamine," "DL methamphetamine" does not appear on the Drug Quantity Table.

Fasanello defined "DL Methamphetamine" by distinguishing it from "D" Methamphetamine and "L" Methamphetamine, the two most common forms:

> [I]f methamphetamine is produced using phenyl-2-propanone which is the most common procedure to produce it here, a combination of 50 percent left-handed and 50 right handed molecules, and they are essentially mirror images of each other, just like a pair of gloves.
>
> So they are the same compound and yet there's the D which would rotate polarized light to the right, that's right-handed, and the L methamphetamine, which would rotate polarized light to the left. There is [sic] those two types. *And then there is the 50-50 mixture, the D/L, sometimes known as the racemate.*
>
> ***
>
> L methamphetamine is approximately one-sixth as physiologically active as D methamphetamine, *which would make D/L, which is a mixture of the two, about 50 percent as potent as D.*

(...continued)
affidavits opining that the substance in question was D Methamphetamine).

(11/14 -- 25-26, 38-39) Importantly, *the two highlighted sentences are the only "definition" of "DL Methamphetamine" in this record.*

Following Fasanello's testimony, Leinenbach renewed his rule of lenity claim that he should be sentenced for "L Methamphetamine" because (a) the Guidelines do not mention "DL Methamphetamine," and (b) Fasanello's testimony failed to show that "Methamphetamine" encompasses "DL Methamphetamine" for Guidelines purposes. (*See, e.g.*, 5/14 -- 86-92, 102) Relying upon *United States v. Carroll*, *supra*, however, the Court adopted the government's view that, as a matter of law, "Methamphetamine," as used in the Guidelines, includes "DL Methamphetamine." (11/14 -- 118 *et. seq.*) Reasoning by negative inference, the *Carroll* Court reached this conclusion because

> [e]xcept to the extent a *particular molecular form* of methamphetamine is treated separately by the Guidelines, [] *we must read references to "Methamphetamine" as encompassing all forms of that substance* [including "DL Methamphetamine"]. Moreover, *the Sentencing Commission demonstrated that it knew how to distinguish the chemical forms of methamphetamine when it singled out L-Methamphetamine* [but not "DL Methamphetamine"] for different treatment in the equivalency tables.

6 F.3d at 745 (Emphasis supplied) (Citation omitted); *accord, e.g., United States v. Decker*, 55 F.3d 1309 (10th Cir. 1995) (Likewise holding that DL Methamphetamine is a single substance comprising equal parts D Methamphetamine and L Methamphetamine, to be sentenced at the higher ratio for Methamphetamine/D Methamphetamine); *United States v.*

Seyfert, 67 F.3d 544, 549 (5th Cir. 1995) (Reavley, J., *concurring*) (Same); *United States v. Watkins, supra*, 912 F.Supp. at 420-421 (Same).

Subsequent to Leinenbach's sentencing, however, the Third Circuit rejected *Carroll*'s premise -- that "DL Methamphetamine" is a separate "molecular form of methamphetamine," *id.* -- in *United States v. Bogusz*, 43 F.3d 82 (3d Cir. 1994), *cert. denied*, _ U.S. _, 115 S.Ct. 1812 (1995). There, in contrast to *Carroll*, the Court squarely held that "'the references to methamphetamine ... in the Drug Quantity Tables of U.S.S.G. § 2D1.1(c) refer *solely* to quantities of D-Methamphetamine....' The Third Circuit, therefore, does *not* consider the entire weight of a dl-methamphetamine mixture to be included within the definition of 'methamphetamine....'" *United States v. Cudemo*, 1995 WL 639746 at *3, *4 (E.D.Pa. 1995) (*Quoting United States v. Bogusz, supra*, 43 F.3d at 91) (Emphasis supplied) (Emphasis in *Cudemo* omitted) (Footnote omitted).

More specifically, the *Bogusz* Court reasoned as follows:

> The Eleventh Circuit, in *United States v. Carroll*, [*supra*,] 6 F.3d [at] 743..., described a third form of methamphetamine: DL-methamphetamine. *Standard texts, however, seem to recognize only two chemical forms of methamphetamine with DL-methamphetamine merely being a combination of the two forms.* *See* Organic Chemistry Text at 127 (defining a racemic mixture as "a 50:50 mixture of enantiomers").

43 F.3d at 89 n.10 (Emphasis supplied); *accord, e.g., United States v. Deninno*, 29 F.3d 572, 579 (10th Cir. 1994) ("Methamphetamine is commonly understood to mean D-

methamphetamine in the sentencing guidelines") (Citations omitted), *cert. denied*, _ U.S. _, 115 S.Ct. 1117 (1995); *United States v. Carroll, supra*, 6 F.3d at 749 (Bright, J., *concurring in part and dissenting in part*) (calculation of methamphetamine amount should be based strictly on the amount of D Methamphetamine); *United States v. Seyfert, supra*, 67 F.3d at 550-51 (Garza, J., *dissenting*) (rejecting "mixture rule" espoused in *Carroll* and *Decker*); *United States v. Cudemo, supra*, 1995 WL 639746 at *4 ("only the actual amount of d-methamphetamine contained in the substances that were either sold or attempted to be sold by the defendant shall be included within the sentencing guideline definition of 'methamphetamine...'").

Plainly, then, the Court is confronted here with a conflict among the Circuits "as to the proper interpretation of the various Guidelines methamphetamine classifications." *Lambert v. United States, supra*, 908 F.Supp. at 359. One court has summarized this conflict as follows:

> At the time of Seyfert's sentencing, no court had addressed the specific question Seyfert raises of whether d,l-methamphetamine is the same as d-methamphetamine for purposes of measuring "Methamphetamine..." under Section 2D1.1, or whether the Government must prove the quantity of d-methamphetamine in a sample of d,l-methamphetamine to sustain its burden regarding the proper quantity. Since that time, the Tenth and Eleventh Circuits have concluded that d,l-methamphetamine should be treated like d-methamphetamine for purposes of Section 2D1.1. *United States v. Decker, [supra]; United States v. Carroll, [supra]*. The Third Circuit has disagreed with what it perceives to be the

> Eleventh Circuit's reasoning on the issue. *United States v. Bogusz, [supra]*.

United States v. Seyfert, supra, 67 F.3d at 548.[14]

---

[14] *See also United States v. Watkins, supra*, 912 F.Supp. at 418-19:

> It appears that those courts that have sought to classify the various types of methamphetamine have adopted at least two (and possibly three) different classification schemes. For example, the Eleventh Circuit has recognized three different types of methamphetamine: "L-methamphetamine, ... an inert form with little or no physiological effects; D-methamphetamine, which has the active physiological effects characteristic of this drug; and DL-methamphetamine, which is composed of 50% L-methamphetamine and 50% D-methamphetamine." *United States v. Carroll, [supra]*, 6 F.3d [at] 743.... The Tenth Circuit has also recognized DL-methamphetamine as a "stand-alone" substance that is more than just a mixture of D-methamphetamine and L-methamphetamine (the court concluded that D-methamphetamine, L-methamphetamine and DL-methamphetamine are separate isomeric forms of the methamphetamine molecule). *United States v. Decker, [supra]*, 55 F.3d [at] 1512 & n.6.... The Third Circuit, however, has determined that there are only two distinct types of methamphetamine, namely D-methamphetamine and L-methamphetamine, concluding that DL-

(continued...)

Indeed, an anomalous third perspective now appears to be emerging in the District Courts: *that "Methamphetamine" actually means "DL Methamphatamine" alone*, while "Ice" -- a recent addition to the Guidelines -- "refers specifically and exclusively to the D-isomer," and "'L-Methamphetamine' is clearly a reference only to the L-isomer of the drug." *Lambert v. United States, supra*, 908 F.Supp. at 362.

To put it mildly, then, this surely is a "confusing and difficult," *United States v. Cook supra*, 49 F.3d at 665 n.3, area -- one in which the lower Courts are crying out for guidance from this Court. Hence, in the first instance, given "the magnitude of the difference in sentencing [*i.e.*, the above-mentioned 10:1 ratio] that could result from the application of the wrong organic isomer," *United States v. Bogusz, supra*, 43 F.3d at 90, we ask this Court to determine, as a matter of law, the definition and correct treatment of DL Methamphetamine for purposes of the Sentencing Guidelines. *Cf. United States v. Seyfert*, 67 F.3d at 547 ("In light of the indication in the laboratory report that two of the three samples of methamphetamine were d,l-methamphetamine, the district court's finding that all three samples were d-methamphetamine was clearly erroneous. However, [rather than remand,] this Court can resolve Seyfert's claims as a matter of law").

Failing that, we ask the Court to remand this case for additional fact-finding on the authority of *United States v. Cook*,

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(...continued)

> methamphetamine is not itself a separate compound, but only a mixture of the other two. *United States v. Bogusz, [supra]*, 43 F.3d [at] 89 n.10....

supra. In *Cook*, the Tenth Circuit joined the Third Circuit in questioning *Carroll*, extending *Bogusz's* reasoning a step further. Like Leinenbach, the defendant, sentenced for "132.2 grams of DL-methamphetmine," argued that his base offense level should have been set "by separately calculating drug equivalents for the 66.1 grams of D-methamphetamine and 66.1 grams of L-methamphetamine using the Drug Equivalency Tables." 49 F.3d at 665. In the defendant's view, this was so because DL Methamphetamine is not "Methamphetamine" under the Guidelines, "but rather a mixture of 50% D-methamphetamine and 50% L-methamphetamine." *Id.*

The Court resolved this claim as follows:

> [T]he Eleventh Circuit based its holding [in *Carroll*] on the conclusion that DL-methamphetamine is a third "molecular form" of methamphetamine instead of simply a mixture of D-methamphetamine and L-methamphetamine.... The Third Circuit recently questioned [this] conclusion ... in [*Bogusz*, *supra*]. In *Bogusz*, the court noted that standard chemistry texts recognize only the D-methamphetamine and L-methamphetamine forms of methamphetamine and view DL-methamphetamine as a combination of the two.... Additionally, the Sentencing Commission appears to be uncertain as to whether DL-methamphetamine is a third form of methamphetamine or is simply a mixture of D-methamphetamine and L-methamphetamine. *See* 60 Fed.Reg.[, *supra*, at 2456] ("In addition, there is another form of methamphetamine (dl-methamphetamine) that is composed of 50% d-methamphetamine and 50% l-methamphetamine").

> Thus, *to determine whether the district court applied the guidelines correctly, we must first determine whether Carroll correctly concluded that DL-methamphetamine is a third "molecular form" of methamphetamine.* To make that determination, we need expert testimony and evidence defining the chemical nature of DL-methamphetamine. Such expert testimony and evidence is entirely absent from the record before us. *We therefore remand the case to the district court with instructions to: (1) determine by expert testimony the chemical nature of DL-methamphetamine -- i.e., whether DL-methamphetamine is simply a mixture of D-methamphetamine and L-methamphetamine, or something else; and (2) resentence Defendant accordingly.*

Id. at 666 (Emphasis supplied).

Here, the *only* "expert testimony and evidence defining the chemical nature of DL-methamphetamine" was Fasanello's two sentences of testimony recited above. As in *Cook*, this is a wholly insufficient basis on which to determine DL-Methemphetamine's structural composition, *i.e.*, whether it is simply a hybrid of "D" and "L" methamphetamine, a separate organic property or "something else?" Indeed, to the extent the Court *does* deem them sufficient, Fasanello's two sentences of testimony imply that DL Methamphetamine is *not* an independent chemical form, suggesting at the very least that Leinenbach should have been sentenced separately on the "D" and "L" components, as claimed in *Cook*. *See* (11/14 -- 26, 39) ("there is the 50-50 mixture, the D/L, sometimes known as the racemate ... which is a mixture of the two, about 50 percent as potent as D").

Accordingly, given the extraordinary 10:1 sentencing disparity between "Methamphetamine" and "L Methamphetamine," we ask the Court to remand this case with the same instructions given in *Cook*. Alternatively, if the Court deems the record adequately developed through Fasanello's two sentences of testimony on this issue, we ask the Court to remand with instructions that Leinenbach be resentenced separately on the "D" and "L" components of DL Methamphetamine.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Burstein & Fass LLP
Attorneys for Petitioner
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New York, New York 10016
(212) 681-0606

On the Petition
Judd Burstein
Marc Fernich

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2157

UNITED STATES OF AMERICA,

v.

JAMES FRANCIS LEINENBACH, a/k/a/ JAMES NELSON,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 93-cr-00280)
District Judge: Hon. Lowell A. Reed, Jr.

Argued October 24, 1995

Before: SLOVITER, Chief Judge
COWEN and GARTH, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to wit

Appendix A
Order of the United States Court of Appeals

1. The trial court erred in excluding, in the face of both parties' contrary agreement, the balance of a redacted audio tape -- unfairly exploited by the government -- containing, *inter alia*, "reverse" other crimes evidence crucial to the defense theory and for context.

2. The trial court gutted Leinenbach's defense and distorted the record when it withheld substantially all of his exhibits from the jury, but sent the jury substantially all of the government's exhibits.

3. Leinenbach's sentence must be remanded, *inter alia*, to determine the chemical nature of DL Methamphetamine, it is

ADJUDGED and ORDERED that the judgment of the district court entered November 16, 1994 be and is hereby affirmed.

By the Court

/s/
Chief Judge

Attest:

/s/
P. Douglas Sisk, Clerk

Dated: Oct 27 1995

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2157

UNITED STATES OF AMERICA,

v.

JAMES FRANCIS LEINENBACH, a/k/a/ JAMES NELSON,

Appellant

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN, and GARTH[1] Circuit Judges

The petition for rehearing filed by

APPELLANT, James Francis Leinenbach

in the above-captioned case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

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1 Hon. Leonard I. Garth, Senior Circuit Judge, as to panel rehearing only

Appendix A
Order of the United States Court of Appeals

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/
Chief Judge

Dated: Dec 11 1995

Letter of the United States Supreme Court

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

February 14, 1996

Mr. Judd Burstein
Burstein & Fass
99 Park Avenue
New York, NY 10016

Re: James Leinenbach
v. United States
Application No. A-671

Dear Mr. Burstein:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on February 14, 1996, extended the time to and including April 9, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

/s/
Sandra Elliott Spagnolo
Assistant Clerk

Appendix A
Letter of the United States Supreme Court

NOTIFICATION LIST

Mr. Judd Burstein
Burstein & Fass
99 Park Avenue
New York, NY 10016

Mr. Drew S. Days III
Solicitor General
U.S. Department of Justice
Washington, DC 20530

P. Douglas Sisk
United States Court of Appeals for
the Third Circuit
601 Market Street, Room 21400
Philadelphia, PA 19106

Appendix B
Constitutional and Statutory Provisions

18 USC § 2 -- Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 USC § 3231 -- District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

21 USC § 841 -- Prohibited acts A

Unlawful acts

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

Appendix B
Constitutional and Statutory Provisions

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

Appendix B
Constitutional and Statutory Provisions

If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

Appendix B
Constitutional and Statutory Provisions

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the

court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor

shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provision of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of

him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him in an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18. or $200,00 if the

defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed --

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical or other hazardous substance on Federal land, and by such use --

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river or body of water,

shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

(c) Repealed. Pub. L. 98-473, Title II, § 224 (a) (2), Oct. 12, 1984, 98 Stat. 2030.

Offenses involving listed chemicals

(d) Any person who knowingly or intentionally --

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the record-keeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

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Boobytraps on Federal property; penalties; definitions

(e) (1) Any person who assembles, maintains, places or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any individual commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) for the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

Ten-year injunction as additional penalty

(f) In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or importation of a listed chemical may be enjoined in regulated transaction involving a listed chemical for not more than ten years.

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Wrongful distribution or possession of listed chemicals

(g) (1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of record keeping or reporting requirement of section 830 of this title) shall be fined under Title 18, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18, or imprisoned not more than one year, or both.

21 USC § 846 -- Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 USC § 848 -- Continuing criminal enterprise

Penalties; forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life

imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

Conditions for life imprisonment for engaging in continuing criminal enterprise

(b) Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a), if --

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2) (A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several

principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

Continuing criminal enterprise defined

(c) For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(d) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be

suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C. Code, secs. 24-203-24-207), shall not apply.

Death penalty

(e) (1) In addition to the other penalties set forth in this section --

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

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(2) As used in paragraph (1)(b), the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

(f) [Not enacted]

Hearing required with respect to the death penalty

(g) A person shall be subjected to the penalty of death for any offense under this section only if a hearing is held in accordance with this section.

Notice by the Government in death penalty cases

(h) (1) Whenever the Government intends to seek the death penalty for an offense under this section for which one of the sentences provided is death, the attorney for the Government, a reasonable time before trial or acceptance by the court of a plea of guilty, shall sign and file with the court, and serve upon the defendant, a notice --

(A) that the Government in the event of conviction will seek the sentence of death; and

(B) setting forth the aggravating factors enumerated in subsection (n) and any other aggravating factors which the Government will seek to prove as the basis for the death penalty.

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(2) The court may permit the attorney for the Government to amend this notice for good cause shown.

Hearing before court or jury

(i) (1) When the attorney for the Government has filed a notice as required under subsection (h) of this section and the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted --

(A) before the jury which determined the defendant's guilt;

(B) before a jury impaneled for the purpose of the hearing if --

(i) the defendant was convicted upon a plea of guilty;

(ii) the defendant was convicted after a trial before the court sitting without a jury;

(iii) the jury which determined the defendant's guilt has been discharged for good cause; or

(iv) after initial imposition of a sentence under this section, redetermination of the sentence under this section is necessary; or

(C) before the court alone, upon the motion of the defendant and with the approval of the Government.

(2) A jury impaneled under paragraph (1)(B) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate with the approval of the court that it shall consist of any number less than 12.

Proof of aggravating and mitigating factors

(j) Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been provided under subsection (h)(1)(B). Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and the defendant shall be

permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The defendant shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

Return of findings

(k) The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in

subsection (n)(1) of this section is not found to exist or an aggravating factor set forth in subsection (n)(1) of this section is found to exist but no other aggravating factor set forth in subsection (n) is found to exist, the court shall impose a sentence, other than death, authorized by law. If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence. The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

Imposition of sentence

(l) Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law. A sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed. A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability --

(1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or

(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

Mitigating factors

(m) In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following --

(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) The defendant is punishable as a principal (as defined in section 2 of title 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

(5) The defendant was youthful, although not under the age of 18.

(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.

(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

Aggravating factors for homicide

(n) If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be

considered, unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section:

(1) The defendant:

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;

(D) intentionally engaged in conduct which:

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.

(2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.

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(4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(8) The defendant committed the offense after substantial planning and premeditation.

(9) The victim was particularly vulnerable due to old age, youth, or infirmity.

(10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(11) The violation of this title in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 859 of this title.

(12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

Right of the defendant to justice without discrimination

(o) (1) In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.

(2) Not later than one year from November 18, 1988, the Comptroller General shall conduct a study of the various procedures used by the several States for determining whether or not to impose the death penalty in particular cases, and shall report to the Congress on whether or not any or all of the various procedures create a significant risk that the race of a defendant, or the race of a victim against whom a crime was committed, influence the likelihood that defendants in those

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States will be sentenced to death. In conducting the study required by this paragraph, the General Accounting Office shall:

(A) use ordinary methods of statistical analysis, including methods comparable to those ruled admissible by the courts in race discrimination cases under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.];

(B) study only crimes occurring after January 1, 1976; and

(C) determine what, if any, other factors, including any relation between any aggravating or mitigating factors and the race of the victim or the defendant, may account for any evidence that the race of the defendant, or the race of the victim, influences the likelihood that defendants will be sentenced to death. In addition, the General Accounting Office shall examine separately and include in the report, death penalty cases involving crimes similar to those covered under this section.

Sentencing in capital cases in which death penalty is not sought or imposed

(p) If a person is convicted for an offense under subsection (e) of this section and the court does not impose the penalty of death, the court may impose a sentence of life imprisonment without the possibility of parole.

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Appeal in capital cases; counsel for financially unable defendants

(q) (1) In any case in which the sentence of death is imposed under this section, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of Title 28. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.

(2) On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

(3) The court shall affirm the sentence if it determines that --

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

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In all other cases the court shall remand the case for reconsideration under this section. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

(4) (A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either --

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6). (7), (8), and (9).

(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less

than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize

the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

Refusal to participate by State and Federal correctional employees

(r) No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

Appendix B
Constitutional and Statutory Provisions

28 USC § 1254(1) -- Courts of Appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Fed. R. Evid. 105 -- Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Supreme Court, U.S.
FILED
JUL 15 1996

No. 95-1633

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES FRANCIS LEINENBACH, AKA JAMES NELSON,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion when it refused to allow certain defense exhibits in the jury room during deliberations.

2. Whether the district court erred in concluding that the quantities of DL-methamphetamine attributed to defendant were properly treated as "methamphetamine" under the 1987 Sentencing Guidelines.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals affirming the district court (Pet. App. 1a-2a) is unpublished, but the decision is noted at 70 F.3d 1258 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-4a) was entered on October 27, 1995. A petition for rehearing was denied on December 11, 1995. On February 14, 1996, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including April 9, 1996, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to manufacture and distribute methamphetamine, in violation of 21 U.S.C. 846; manufacturing methamphetamine, in violation of 21 U.S.C. 841(a)(1); and possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. 1. He was sentenced to 324 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 1a-2a.

1. Beginning in the fall of 1986, petitioner conspired with William Kelly and others to manufacture methamphetamine. Petitioner agreed to supply Kelly with P2P, a precursor chemical, and Kelly agreed to provide other chemicals and equipment, to find places to manufacture the drug, and to act as the "cook." Gov't C.A. Br. 7. Thereafter, Kelly manufactured methamphetamine on numerous occasions, using P2P supplied by petitioner. In each instance, Kelly used the "P2P-aluminum reduction" method of production. *Id.* at 7-14.

2. On May 28, 1993, petitioner was indicted. The government's evidence at trial included testimony from Kelly and other co-conspirators. Gov't C.A. Br. 4, 6-15; 18-23. In addition, the government introduced a tape-recorded conversation between petitioner and a co-conspirator during which petitioner admitted to his past efforts to manufacture methamphetamine with Kelly. *Id.* at 16-18.

Petitioner attempted to impeach several witnesses by cross-examining them extensively regarding the benefits they received from their cooperation with the

government. Petitioner offered as exhibits copies of the witnesses' indictments and plea agreements and the government's sentencing memoranda. Gov't C.A. Br. 37. Although the court admitted those documents into evidence and allowed petitioner to use them during cross-examination and in his closing argument, it warned petitioner that it might not allow the documents themselves to go to the jury. *Ibid.* After the jury retired to deliberate, the court met with counsel to decide which government exhibits would be sent to the jury room. With only one exception, the defense consented to the jury's use of all of the exhibits proposed by the government. C.A. App. 38-44. Then, although he had previously indicated that he did not intend to send any defense exhibits to the jury, defense counsel proposed that the jury also be given many of the exhibits introduced during his efforts to impeach the government's witnesses. *Id.* at 45-66. The government objected, and the district court concluded that those exhibits should not be sent to the jury. In so ruling, the court noted that the documents contained "all sorts of extraneous material," including "hearsay" and "inadmissible, irrelevant, objectionable material" that had not been presented to the jury. *Id.* at 51, 57, 61. The court also observed that "the defendant has got full advantage of these agreements with these witnesses to attack their credibility * * * and has argued the importance of these matters to the jury." *Id.* at 63. Petitioner did not contest those conclusions, but argued that the exhibits should be sent to the jury because they had been received into evidence. See, *e.g.*, *id.* at 46, 48. On May 16, 1994, the jury found petitioner guilty on all counts.

3. A presentence report (PSR) prepared by the Probation Office concluded that petitioner had been involved in the manufacture of 127 pounds of "cut" methamphetamine. PSR 7. Using the Drug Equivalency Table in Section 2D1.1 of the November 1, 1987, Sentencing Guidelines Manual, the PSR calculated a base offense level of 36.[1] Petitioner objected to the PSR because it used the drug equivalency for "methamphetamine," rather than the lesser drug equivalency for "L-methamphetamine/Levo-methamphetamine/L-Desoxyephedrine" to calculate his base offense level. In response, the government introduced expert testimony at petitioner's sentencing from Jack Fasanello, a senior forensic chemist with the Drug Enforcement Administration (DEA). Mr. Fasanello testified that methamphetamine occurs in two separate optical isomers, L-methamphetamine and D-methamphetamine. Sent. Tr. 25-26; see also *United States* v. *Carroll*, 6 F.3d 735, 743 (11th Cir. 1993), cert. denied, 114 S. Ct. 1234 (1994). L-methamphetamine has little physiological effect on the human nervous system, while D-methamphetamine produces the "high" desired by methamphetamine users. Sent. Tr. 38-39; *Carroll*, 6 F.3d at 743. Mr. Fasanello further testified that the "P2P/aluminum reduction reaction" method used by the conspiracy invariably produced "DL-methamphetamine," which consists of 50% D-methamphetamine molecules, and 50% L-methamphetamine molecules. Sent. Tr. 25-26, 36. DL-

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[1] All parties agreed that the 1987 Guidelines were less onerous to petitioner than the Guidelines in effect at the time of sentencing, and that the 1987 Guidelines should be used in sentencing. Pet. 19.

methamphetamine is about 50% as potent as D-methamphetamine. *Id.* at 39.

Based on that testimony, the district court concluded that the methamphetamine produced by petitioner was DL-methamphetamine, not L-methamphetamine. Sent. Tr. 118.[2] The court rejected petitioner's claim that the drug equivalency for L-methamphetamine should be used to calculate his base offense level. Instead, the court calculated that offense level using the drug equivalency for "methamphetamine," which yielded a level of 36, and a Guidelines sentencing range of 324 to 405 months' imprisonment.[3] Petitioner received the lowest possible sentence within the applicable range.

4. On appeal, petitioner argued, *inter alia*, that the trial court erred when it declined to send into the jury room during deliberations certain defense exhibits admitted at trial. Petitioner also argued that the district court erred in concluding that DL-methamphetamine is "methamphetamine" within the meaning of the 1987 Guidelines. The court of appeals affirmed. Pet. App. 1a-2a.

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[2] In reaching that conclusion, the district court also relied on the fact that persons who had tried the drugs testified that they were "good" product, and the fact that knowledgeable customers were willing to buy the drugs. Sent. Tr. 118-119; see Gov't C.A. Br. 42-43.

[3] The district court concluded that petitioner manufactured 90 pounds of cut methamphetamine, and that he was subject to a two level increase in his base offense level under Guidelines § 3B1.1(c) (1987) for his aggravating role in the offense. Sent. Tr. 119-122, 126. Combined with petitioner's criminal history category of IV, those findings yielded a sentencing range of 324-405 months' imprisonment. *Id.* at 128.

ARGUMENT

1. Petitioner renews his claim that the district court erred when it refused to allow certain defense exhibits in the jury room during deliberations. Pet. 8-19. That claim is incorrect. The courts of appeals have uniformly held that "[w]hether * * * evidentiary exhibits properly admitted should or should not accompany the jury to the jury room is a discretionary matter for the trial court." *United States* v. *McCarthy*, 961 F.2d 972, 978 (1st Cir. 1992) (internal quotation marks omitted); see *United States* v. *Ulerio*, 859 F.2d 1144, 1145 (2d Cir. 1988); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 201 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); *United States* v. *Aragon*, 983 F.2d 1306, 1309 (4th Cir. 1993); *United States* v. *Zepeda-Santana*, 569 F.2d 1386, 1391 (5th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Scaife*, 749 F.2d 338, 347 (6th Cir. 1984); *United States* v. *Burrell*, 963 F.2d 976, 982 (7th Cir.), cert. denied, 506 U.S. 928 (1992); *United States* v. *Robinson*, 774 F.2d 261, 275-276 (8th Cir. 1985); *United States* v. *DeCoito*, 764 F.2d 690, 695 (9th Cir. 1985); *United States* v. *De Hernandez*, 745 F.2d 1305, 1308 (10th Cir. 1984); *United States* v. *Sims*, 719 F.2d 375, 379 (11th Cir. 1983), cert. denied, 465 U.S. 1034 (1984); *Dallago* v. *United States*, 427 F.2d 546, 553 (D.C. Cir. 1969). Accordingly, "[t]he trial court may send all or part of the exhibits admitted into evidence to the jury before or after it has begun its deliberations." *De Hernandez*, 745 F.2d at 1308. The court's determination regarding which exhibits may be considered by the jury during deliberations is reviewed for abuse of discretion. *DeCoito*, 764 F.2d at 695. Thus, contrary

to petitioner's claim, the decision below did not violate any "Circuit-wide presumption" that the jury was "entitled to see" those exhibits simply because they had been admitted into evidence. Pet. 13.[4]

The only question presented here, therefore, is whether the district court abused its discretion. The district court did not abuse its discretion. As the court observed, portions of petitioner's exhibits contained extraneous material, including "hearsay" and "inadmissible, irrelevant, objectionable material." C.A. App. 51, 57, 61. Petitioner now contends that the district court should have given the jury the admittedly inappropriate material, subject only to a limiting instruction. Pet. 14. The court permissibly concluded, however, that a limiting instruction would not have been appropriate here. Such an instruction may be given when evidence is admissible for one purpose (*e.g.*, to show bias) but not another (*e.g.*, to prove guilt). See, *e.g.*, *United States* v. *Werme*, 939 F.2d 108, 113 (3d Cir. 1991), cert. denied, 502 U.S. 1092 (1992); Fed. R. Evid. 105. That was not the case here with respect to the hearsay in petitioner's exhibits, which was not admissible for any purpose. Petitioner's alternative claim that the judge should have

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[4] The cases on which petitioner relies (Pet. 9) for his claim of a "Circuit-wide presumption" do not support that view. In *DeCoito*, 764 F.2d at 695, the Ninth Circuit noted that "[j]urors are generally entitled to examine documents properly admitted in evidence." Immediately thereafter, however, the court observed that "the decision to send such exhibits to the jury room is within the discretion of the trial court." Likewise, in *Dallago*, 427 F.2d at 553, the D.C. Circuit observed that "[the examination of documents admitted into evidence] in the jury room during deliberations is a matter within the sound discretion of the trial court."

attempted to redact all of the inadmissible materials from his exhibits (Pet. 10 n.7) comes too late, because petitioner never proposed that solution at trial. Nor is there merit to petitioner's claim that, having excluded some of his exhibits from the jury room, the trial court should have cautioned the jury not to place "undue emphasis" on the exhibits provided to them. Pet. 16 n.9. While such an instruction may be advisable, see *De Hernandez*, 745 F.2d at 1308, it was not requested here.

Finally, petitioner contends that the district court's rulings constituted an abuse of discretion because the jury was allowed to view more of the prosecution exhibits than the defense exhibits. According to petitioner, that "disparity" runs counter to Seventh Circuit decisions requiring that the district court be "evenhanded" in deciding which exhibits to allow into the jury room. Pet. 14-16 (citing *United States* v. *Medina*, 552 F.2d 181, 191-192 (7th Cir.), cert. denied, 434 U.S. 839 (1977); *United States* v. *Samples*, 713 F.2d 298, 303 (7th Cir. 1983); *United States* v. *Hofer*, 995 F.2d 746, 749 (7th Cir. 1993)). As petitioner notes, the Seventh Circuit has stated that a district court should be "evenhanded" in allowing evidence into the jury room, but it has established no bright line rule as to what constitutes "evenhandedness." In this case, where petitioner *consented* to allowing the jury to view the government's exhibits, and the government properly objected to the viewing of his because they contained "inadmissible, irrelevant, [or] objectionable material," the fact that the jury ultimately saw more of the government's exhibits does not violate any principle of evenhanded-

ness.[5] The judge applied the same rules equally to all parties.

2. Petitioner also contends (Pet. i, 19-30) that this Court should grant certiorari to "clarif[y]" the treatment of DL-methamphetamine under the Sentencing Guidelines.

Petitioner contends that the district court erred in treating the DL-methamphetamine he manufactured as "methamphetamine" and suggests that his sentence should be recalculated by considering the "D" and "L" components of the DL-methamphetamine separately. Pet. 30. There is no basis for that claim.

The 1987 Guidelines refer to only two types of methamphetamine: "methamphetamine" and "L-methamphetamine." Guidelines § 2D1.1, Drug Equivalency Table (1987). A note to Section 2D1.1 specifies that if a controlled substance is in a mixture or compound, "the entire amount of the mixture or compound shall be considered in measuring the quantity." Guidelines § 2D1.1 n.* (1987). Further, "[i]f a mixture or compound contains a detectable amount of more than one controlled substance, the most serious controlled substance shall determine the categorization of the entire quantity." *Ibid.* Thus, the entire weight of a substance containing DL-methamphetamine is properly classified as "methamphetamine," rather than L-methamphetamine, under the 1987 Guidelines. Accord *United*

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[5] After the district court completed its rulings on defense exhibits, petitioner attempted to withdraw his consent to the jury's viewing of the prosecution's exhibits. C.A. App. 64. He offered no reason why the government's exhibits should not be viewed by the jury, however, and the district court overruled the belated objection. *Ibid.*

States v. *Watkins*, 912 F. Supp. 417, 419-420 (E.D. Ark. 1996).

Petitioner relies on cases interpreting later, and significantly different, versions of the Guidelines. As noted above, the 1987 Guidelines sentenced methamphetamine offenders based only on the total weight of a "mixture" containing methamphetamine, without regard to the mixture's purity. Beginning on November 1, 1989, however, the Guidelines were amended to provide different offense levels for "methamphetamine" and "pure methamphetamine" and to instruct: "In the case of a mixture or substance containing * * * methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure * * * methamphetamine, whichever is greater." Guidelines § 2D1.1(c), n.* (1989). In 1991, the term "pure methamphetamine" was replaced by "methamphetamine (actual)." Guidelines § 2D1.1(c), n.* (1991).[6] Those amendments raised the issue of whether, in determining the "purity" of a sample of DL-methamphetamine, the court should measure the relatively inert L component as well as the active D component. The majority of courts that have reached the issue have concluded that "pure methamphetamine" and "methamphetamine (actual)" include DL-methamphetamine, so that a sample of 100% DL-methamphetamine should be considered

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[6] Courts of appeals have concluded that the switch from the term "pure methamphetamine" to "methamphetamine (actual)" was not intended as a substantive change in the Guidelines. *United States* v. *Carroll*, 6 F.3d 735, 744 n.7 (11th Cir. 1993); *United States* v. *Decker*, 55 F.3d 1509, 1511 (10th Cir. 1995).

100% "pure." *United States* v. *Decker*, 55 F.3d 1509, 1511-1513 (10th Cir. 1995); *United States* v. *Carroll*, 6 F.3d 735, 743-747 (11th Cir. 1993); see also *United States* v. *Seyfert*, 67 F.3d 544, 549 (5th Cir. 1995) (Reavley, J., concurring); *Lambert* v. *United States*, 908 F. Supp. 356, 361-362 (W.D. Va. 1995). The Third Circuit, however, has concluded that "the references to methamphetamine and methamphetamine (actual) in the Drug Quantity Tables of U.S.S.G. § 2D1.1(c) refer solely to quantities of D-methamphetamine." *United States* v. *Bogusz*, 43 F.3d 82, 91 (1994), cert. denied, 115 S. Ct. 1812 (1995). That difference in approach has no bearing in this case, because the 1987 Guidelines do not require the court to determine the purity of the DL-methamphetamine petitioner produced, and it is undisputed that the drugs produced contained D-methamphetamine, so that the entire "mixture or compound" was properly considered to be "methamphetamine." Indeed, petitioner cites no case where a court has used anything other than the entire weight of DL-methamphetamine in considering the quantity of "Methamphetamine" under Guidelines § 2D1.1(c).[7] Thus, contrary to petitioner's claim,

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[7] The only allegedly conflicting case that petitioner cites, *United States* v. *Cudemo*, No. 92065301, 1995 WL 639746 at *3, *4 (E.D. Pa. Oct. 30, 1995) (Pet. 24, 25), is entirely consistent with the decision below. In *Cudemo*, the district court, relying on *Bogusz*, concluded that "only the actual amount of d-methamphetamine * * * shall be included within the sentencing guideline definition of '*methamphetamine (actual)*.'" *Id.* at *4 (emphasis added). The court also concluded that the entire weight of a sample of DL-methamphetamine constituted "methamphetamine" within the meaning of Guidelines § 2D1.1(c). *Ibid.*

there is no "confusion" regarding methamphetamine sentencing that has any relevance to his case.[8]

In addition, certiorari is not warranted here because the Sentencing Commission has recently amended the Guidelines by removing the lower penalties for L-methamphetamine from the Drug Equivalency Tables. See United States Sentencing Comm'n, *Federal Guidelines Manual*, App. C, amend. 518, at 817 (Nov. 1, 1995). As a result, L and D-methamphetamine are now treated the same, eliminating any question regarding the proper treatment of DL-methamphetamine.[9] See *United States* v. *Watkins*, 912 F. Supp. 417, 419 n.4 (E.D. Ark. 1996). Thus, any confusion regarding the proper treatment of DL-methamphetamine is of limited future consequence.

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[8] Petitioner's claim that a remand is required to determine the chemical nature of DL-methamphetamine (Pet. 27-29) is similarly misplaced. *United States* v. *Cook*, 49 F.3d 663, 665 (10th Cir. 1995), the case on which petitioner relies, considered whether DL-methamphetamine constituted "pure methamphetamine" under the 1989 version of the Guidelines, an issue not presented here. Moreover, the Tenth Circuit subsequently resolved that question by concluding that DL-methamphetamine does qualify as "methamphetamine (actual)." *Decker*, 55 F.3d at 1511-1513.

[9] There is no merit to petitioner's suggestion (Pet. 21 n.13) that this case involves a circuit conflict over the use of expert testimony in sentencing methamphetamine offenders. Although the Ninth Circuit has concluded that affidavits stating that clandestine labs almost always produce DL or D-methamphetamine are insufficient, standing alone, to show that the drug involved was not L-methamphetamine, *United States* v. *Dudden*, 65 F.3d 1461, 1471 (1995), no court has suggested that the evidence presented here, including a specific analysis of the manufacturing methods used, and testimony regarding the drug's effect, see pp. 4-5 & note 2, *supra*, is likewise insufficient.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1996